RECORD, CASE No. 14,947.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1473.

EDWARD H. HORNER, APPELLANT,

vs.

THE UNITED STATES, JOHN W. JACOBUS, INDIVIDUALLY AND AS MARSHAL OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND JOHN A. SHIELDS, UNITED STATES COMMISSIONER FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 16, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1891.

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1 To the honorable the circuit court of the United States for the southern district of New York:

The petition and complaint of Edward H. Horner respectfully shows to this court:

I.

That at all the times herein mentioned he was, and now is, a resident of the city and county of New York, in the State of New York, in the southern district of New York.

II.

That your petitioner is imprisoned and restrained of his liberty and in the custody of and by John W. Jacobus, marshal of the United States for the southern district of New York, and John A. Shields, Esq., commissioner for the southern district of New York, under and by color of the authority of the United States, wrongfully and unlawfully, as your petitioner verily believes.

III.

That he has not been apprehended and is not detained by virtue of any judgment or decree of any court.

IV.

That the cause or pretense of the imprisonment and restraint of your petitioner is an arrest, by direction of said United States commissioner, based upon and by virtue of a certain complaint or information for a pretended violation of the laws of the United States.

V.

2 That said petition and proceedings thereunder fail to show the commission of any offense against or in violation of the laws of the United States; and said complaint or information and the proceedings thereunder are not in fact for and do not charge the commission of any offense which is an offense against the laws of the United States.

VI.

That, as your petitioner is informed and verily believes, the proceedings before said commissioner are without jurisdiction and void and unconstitutional, and your petitioner is restrained of his liberty thereunder against his rights under the Constitution and the laws of the United States and unlawfully and without authority under the guise and color of contemplated proceedings against him for the commission of an alleged offense against the laws of the United States, which said alleged offense is not, as petitioner is informed and verily believes, any offense whatsoever.

Wherefore your petitioner prays that your honorable court will

order a writ of *habeas corpus* to be issued out of this court to said John W. Jacobus, marshals aforesaid, and to said John A. Shields, commissioner as aforesaid, requiring them to produce the body of your petitioner before this court at some time to be designated in said writ, then and there to abide what shall be ordered by this court in the premises, and in the meantime your petitioner prays that he may be committed to the custody of his counsel; and at the same time your petitioner prays that this honorable court will direct

3 a writ of certiorari to be issued out of this court to said John A. Shields ordering and requiring said commissioner forthwith to certify to this court true copies of the alleged complaint or information and all other papers and proceedings relating to the premises and to the cause of the restraint of your petitioner, and as in duty bound your petitioner will ever pray, etc.

EDW. H. HORNER, *Petitioner.*

TAYLOR & PARKER,
Att'ys for Pet'r, 15 Wall Street, New York City.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Edward H. Horner, being duly sworn, says: I am the petitioner and complainant hereinbefore named.

That the foregoing petition is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

No previous application, either for the writ of certiorari or the writ of *habeas corpus*, has been made herein.

E. H. HORNER.

Sworn to before me this 17th day of November, 1891.

[SEAL.] GILBERT E. ROGERS,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) U. S. circuit court, southern district of New

4 York. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus* and a writ of certiorari. Petition and order. Taylor & Parker, attorneys for petitioner, 15 Wall street, New York city. U. S. circuit court. Filed Nov. 17, 1891. John A. Shields, clerk.

5 At a stated term of the circuit court of the United States for the southern district of New York, held in the post-office building, in the city, county, and State of New York, on the 17th day of November, 1891.

Present: Hon. Hoyt H. Wheeler, judge.

In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus* and a Writ of Certiorari.

On reading and filing the foregoing petition, hereto annexed, and upon motion of Taylor & Parker, Esquires, attorneys for the petitioner—

It is ordered that the writs of *habeas corpus* and certiorari issue to the Honorable John W. Jacobus, marshal of the United States, and Honorable John A. Shields, United States commissioner, respectively, as prayed for in the said petition, the said writs to be returned with the return of said marshal and the said United States commissioner thereto on the 17th day of November, 1891, at 11 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, at the post-office building, in the city and county and State of New York, at a stated term of this court, then and there to be *heard*.

HOYT H. WHEELER.

6 The President of the United States to Honorable John W. Jacobus, marshal of the United States for the southern district of New York, and Honorable John A. Shields, United States commissioner, Greeting:

Habeas Corpus to Bring Up Person.

We command you that you have the body of Edward H. Horner, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said Edward H. Horner shall be caused or charged, before a stated term of the circuit court of the United States for the southern district of New York, to be held in the post-office building of the city and county and State of New York, at 11 o'clock a. m. on November 17, 1891, to do and receive what shall then and there be considered concerning the said Edward H. Horner, and have with you then and there this writ.

[SEAL.] Witness Honorable Melville W. Fuller, Chief Justice of the United States, on the 17th day of November, 1891.

JOHN A. SHIELDS, *Clerk.*

TAYLOR & PARKER,
Petitioner's Attorneys, 15 Wall street, New York City.

7 (Endorsed:) U. S. circuit court, southern district of New York. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus*. *Habeas corpus*. Taylor & Parker, attorneys for petitioner, 15 Wall street, New York city.

8 The President of the United States of America to the marshal of the United States for the southern district of New York and to his deputies or any or either of them:

Whereas complaint on oath hath been made to me charging that Edward H. Horner did, on or about the twenty-ninth day of December, in the year one thousand eight hundred and ninety, at the southern district of New York, unlawfully deposit and cause to be deposited in the post office, at the city of New York, in the aforesaid district, a certain circular to be conveyed and delivered by mail, which in the contents thereof, hereinafter set forth, concerned a lottery, and which was then and there addres-ed to Joseph Ehrman, 70 Dearborn street, Chicago, Illinois, and was enclosed in an en-

velope, with postage thereon prepaid, and carried by mail, and which said circular contained, among other things, the following, to wit:

538.

"Banking-house of E. H. Horner, No. 88 Wall street.

"NEW YORK, *December* 27, 1890.

"*Austrian State Bonds of* 1884.

"110th redemption December 1st, 1890, at Wien. The following 26 series were called in:

"Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.
"121	36	20000	1369	24	24 400	2666	63	400
"271	75	400		46	400		84	400
"280	22	1000	1792	19	400	2988	2	400
	65	400	1970	16	2000		10	400
"461	37	400		69	400		48	150000
9								
"481	54	400		70	5000		88	400
	72	10000	2388	28	400	3195	44	5000
"487	69	400	2412	53	400		50	400
"493	6	400		74	400	3238	14	400
"684	14	400		82	400		52	400
	56	400	2483	36	400	3486	35	400
	94	400	2526	72	400	3685	39	400
"815	70	400		82	400		81	400
	82	400	2531	44	400	3965	4	400
"853	23	400		91	1000		14	400
	61	400	2666	3	400		50	400
	81	400		18	2000			

"All other bonds contained in the above twenty-six series not specially mentioned therein are redeemed with fl. 200.

"Payment on and after March 1, 1891.

"The next report of redemption will be published in the second half of the month of January, 1891. Customers who have been notified by special letter of the redemption of their bonds can cash the respective amounts at my office."

That the said words and figures of the said circular relate to and concern and were understood by said Joseph Ehrman to relate to and concern certain so-called bonds issued by the Empire of Austria, and to state on which of said so-called bonds payments were to be made and the amount thereof. The following is a translation of the face of one of such so-called bonds:

"Series 921. 100 florins. Number 60.

"*Premium Bonds.*

"One hundred florins, Austrian standard, as share of the loan of forty million florins, Austrian standard, made according to the law of November 17th, 1863 (Law Journal of the Empire No. 98), for which the amount resulting according to the plan of redemption will be paid to the bearer by the Universal State Loan Treasury."

"Vienna, February 11th, 1864.

"(Signed) JOSEPH RUDDE,
"(Coat of arms.) *Imperial Royal Minister, Counsellor.*
"(Signed) PLENER,
"*Imperial Royal Minister of Justice.*

"For the board controlling the State loans:
"(Signed) COLLERDO MANNSFELDT.
"(Signed) WINTERSTEIN."

"For the imperial royal universal state loan treasury:
"(Signed) WINTER.
"(Signed) SCHIMOSWKY.

Each of the so-called bonds has upon its face a series number and a number in the series.

The amount of indebtedness which said so-called bonds purports to evidence is one hundred (100) florins.

The plan of drawing set forth on the back of said so-called bond shows that up to April, 1874, there were to take place five drawings a year, on dates therein stated, which should determine upon which of the so-called bonds payments should be made and the amounts of payments.

That thereafter and until the end of the nineteenth (19th) year after the date of the issue of the so-called bonds four drawings per year were to take place at stated dates for the same purpose, and that thereafter, to and including the thirty-first (31st) year, three (3) drawings were to take place at fixed dates for each year for the same purpose, and that thereafter, to and including the fifty-fifth (55th) year after the date of issue of such so-called bonds, two (2) drawings per year were to take place for the same purpose, at the end of which time all of said so-called bonds were, according to the plan aforesaid, to be paid.

That according to said plan the smallest amount to be paid for any of such so-called bonds selected for payment during the first year after issue was one hundred and thirty-five (135) gulden;
11 during the second year, one hundred and forty (140) gulden, and during the third year, one hundred and forty-five (145) gulden, and so on, increasing in amount five (5) gulden each year, until the amount should reach two hundred (200) gulden, which amount then remained fixed as the minimum sum to be paid for any of the so-called bonds whose payment should be determined by the drawings aforesaid.

That gulden and florins are denominations of money of the same value.

That under the said plan other larger amounts are provided to be paid on certain of the so-called bonds, to be determined by the drawings. Thus during the first year the following sums are, according to said plan, to be paid on certain so-called bonds, to be determined by such drawings, to wit:

On one bond	250,000 gulden.
" " "	25,000 "
" " "	15,000 "
" " "	10,000 "
On 2 bonds, each at 5,000 gulden	10,000 "
On 3 bonds, each at 2,000 gulden	6,000 "
On 6 bonds, each at 1,000 gulden	6,000 "
On 15 bonds, each at 500 gulden	7,500 "
On 30 bonds, each at 400 gulden	12,000 "

and during subsequent periods other provision is made for such larger amounts.

That all of the said so-called bonds are in the same form as said copy translation, and have the same drawing and redemption plan endorsed upon them, and are identical in all respects, except that the series numbers and the number thereof vary as to each so-called bond.

That all the drawings heretofore referred to by which, first,
12 are determined the series of the so-called bonds to be paid or redeemed in each year, and, second, are determined the particular bonds in the series whose holders shall be entitled to the larger sums aforesaid, the numbers of which are drawn from the wheel, are conducted in such a way as that the determination of the numbers both for redemption and for amounts is wholly by lot or chance. The holder of each so-called bond has an equal chance with the holder of every other so-called bond, first, in securing an early payment of his so-called bond, and, second, in securing as a so-called payment for his so-called bond the very large prizes to which reference has already been made, the result in each case, as before alleged, being dependent wholly on lot or chance, all then and there against the peace and dignity of the United States of America and contrary to and in violation of section three thousand eight hundred and ninety-four (3894) of the Revised Statutes of the United States as amended by the act of September nineteenth (19th), one thousand eight hundred and ninety (1890):

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Edward H. Horner and bring his body forthwith before me or some judge of justice of the United States, wherever in the State of New York he may be found, that he may then and there be dealt with according to law for the said offence.

Given under my hand and seal this tenth day of August,
13 in the year of our Lord one thousand eight hundred and ninety-one.

JOHN A. SHIELDS,
United States Commissioner for the Southern District of New York.

EDWARD MITCHELL,
United States Attorney.

(Endorsed.)

The within-named accused, Edward H. Horner, being arrested and brought before me on the within warrant, and the charge being explained to him, and he demanding an examination on the charge, the said examination being proceeded with but not completed, the further examination is adjourned by consent to August 11th, 1891, at 4 o'clock p. m., and the accused, Edward H. Horner, is hereby committed to the custody of the United States marshal for the southern district of New York, to be brought before me for further examination on the 11th day of August, 1891, at 4 o'clock p. m., in default of $5,000 bail.

New York, August 10, 1891.

JOHN A. SHIELDS,
U. S. Commissioner.

To John W. Jacobus, Esq., U. S. marshal, S. D. of N. Y.

H. O.

The within-named accused, Edward H. Horner, discharged on his own recognizance by consent of Mr. Evarts, assistant U. S. att'y, until Aug. 11, 1891, at 4 o'clock, for the purpose of giving bail.

New York, August 10, 1891.

JOHN A. SHIELDS,
U. S. Commissioner.

H. O.

14 The within-named accused, Edward H. Horner, being brought before me this day for further examination, and said examination being completed before me, and it appearing to me from the testimony offered that there is probable cause to believe the said Edward H. Horner guilty of the offence charged in the within warrant, the said Edward H. Horner is hereby committed to the custody of the U. S. marshal for the southern district of New York to await the action of the grand jury in default of $5,000 bail.

New York, August 11, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

H. O.

To John W. Jacobus, Esq., U. S. marshal, S. D. of N. Y.

The within-named accused, Edward H. Horner, discharged on his own recognizance by consent of Mr. Evarts, assistant U. S. att'y, until Aug. 13, 1891, at 10 o'clock a. m., for the purpose of giving bail.

Aug. 11, 1891.

JOHN A. SHIELDS,
U. S. Commissioner.

H. O.

Def't discharged on bail to await trial.
Aug. 13, 1891.

JOHN A. SHIELDS,
U. S. Commissioner.

H. O.

United States *vs.* Edward H. Horner. Warrant.

15 The accused, Edward H. Horner, named in the annexed warrant having been surrendered before me this day by his surety, the said Edward H. Horner is hereby committed to the custody of the United States marshal for the southern district of New York, on the annexed warrant, to await the action of the grand jury in default of $5,000 bail.

New York, Nov. 17, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

Def't, Edward H. Horner, discharged on his own recognizance by consent of Mr. Evarts, assistant U. S. att'y, until Nov. 19, 1891, at 11 o'clock a. m., for the purpose of giving bail.

Nov. 17, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

A. R. G.
G. H. B.

Def't discharged on bail to await trial.
Nov. 19, 1891.

JOHN A. SHIELDS,
U. S. Commissioner.

A. R. G.

16 U. S. Circuit Court, So. Dist. of N. Y.

In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus.*

In obedience to the writs issued herein I hereby return the petitioner's body and respectfully show that the warrant for his detention by me is the warrant herewith returned to the court.

N. Y., Nov. 17, 1891.

J. W. JACOBUS,
U. S. Marshal.

(Endorsed:) U. S. circuit court, so. dist. N. Y. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus*. *Habeas corpus* and return. U. S. circuit court. Filed Nov. 17, 1891. John A. Shields, clerk.

17 The President of the United States to Hon. John A. Shields, United States commissioner for the southern district of New York, Greeting:

We command you to return and certify to this court the complaint or information and other papers and proceedings relating to the cause of the detention of Edward H. Horner, now, it is claimed, restrained of his liberty by the United States marshal for the southern district of New York, and that you make such return at a stated term of the circuit court of the United States for the southern district of New York to be held at the post-office building in the city of New York on November 17, 1891, at 11 o'clock a. m. of that day; and hereof fail not at your peril.

Witness Hon. Melville W. Fuller, Chief Justice of the United States, on November 17, 1891.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

TAYLOR & PARKER,
Petitioner's Attorneys, 15 Wall Street, New York City.

18 (Endorsed:) U. S. circuit court, southern district of New York. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus*. Writ of certiorari. Taylor & Parker, attorneys for petitioner, 15 Wall street, New York city. U. S. circuit court. Filed Nov. 17, 1891. John A. Shields, clerk.

19 UNITED STATES OF AMERICA, }
Southern District of New York. }

William Conard, being duly sworn, says that he is a post-office inspector of the United States; that on the twenty-ninth (29th) of December, in the year of our Lord one thousand eight hundred and ninety (1890), Edward H. Horner, of New York city, did then and there on the day and year aforesaid unlawfully deposit and cause to be deposited in the post office at the city of New York, in the State of New York, in the aforesaid district, a certain circular to be conveyed and delivered by mail, which in the contents thereof, hereinafter set forth, concerned a lottery, and which was then and there addressed to Joseph Erhman, 70 Dearborn street, Chicago, Illinois, and was enclosed in an envelope, with postage thereon prepaid, and carried by mail, and which said circular contained, among other things, the following, to wit:

"538.

"Banking-house of E. H. Horner, No. 88 Wall street.

"NEW YORK, *December* 27, 1890.

"*Austrian State Bond of* 1864.

"110th redemption, December 1st, 1890, at Wein. The following 26 series were called in:

"Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.
"121	36	20000	1369	24	24 400	2666	63	400
"271	75	400		46	400		84	400
"280	22	1000	1792	19	400	2988	2	400
	65	400	1970	16	2 000		10	400
"461	37	400		69	400		48	50000
"481	54	400		70	5,000		88	400
	72	10000	2388	28	400	3195	44	5000
"487	69	400	2412	53	400		50	400
20								
"493	6	400		74	400	3238	14	400
"684	14	400		82	400		52	400
	56	400	2483	36	400	3486	35	400
	94	400	2526	72	400	3685	39	400
"815	70	400		82	400		81	400
	82	400	2531	44	400	3969	4	400
"853	23	400		91	1000		14	400
	61	400	2666	3	400		50	400
	81	400		18	2000			

"All other bonds contained in the above twenty-six series not especially mentioned therein are redeemed with fl. 200.

"Payment on and after March 1, 1891.

"The next report of redemption will be published in the second half of the month of January, 1891.

"Customers who have been notified by special letter of the redemption of their bonds can cash the respective amounts at my office."

That the said words and figures of the said circular relate to and concern and were understood by said Joseph Ehrman to relate to and concern certain so-called bonds issued by the Empire of Austria, and to state on which of said so-called bonds payments were to be made and the amount thereof. The following is a translation of the face of one of such so-called bonds:

"Series 921. 100 florins. Number 60.

"*Premium Bonds.*

"One hundred florins, Austrian standard, as share of the loan of forty million florins, Austrian standard, made according to the law of November 17th, 1863 (Law Journal of the Empire, No. 98), for

which the amount resulting according to the plan of redemption will be paid to the bearer by the universal state loan treasury.

Vienna, February 11th, 1864.

"(Signed) JOSEPH RUDDE,
(Coat of arms.) "*Imperial Royal Minister Counsellor.*
"(Signed) PLENER,
"*Imperial Royal Minister of Justice.*

21 "For the board for controlling the state loans:
"(Signed) COLLERDO MANNSFELDT.
"(Signed) WINTERSTEIN.

"For the imperial royal universal state loan treasury:
"(Signed) WINTER.
"(Signed) SCHIMKOWSKY."

Each of the so-called bonds has upon its face a series number and a number in the series.

The amount of indebtedness which said so-called bond purports to evidence is one hundred (100) florins.

The plan of drawing set forth on the back of said so-called bond shows that up to April, 1874, there were to take place five drawings a year, on dates therein stated, which should determine upon which of the so-called bonds payments should be made and the amounts of such payments.

That thereafter and until the end of the nineteenth (19th) year after the date of the issue of the so-called bonds four drawings per year were to take place at stated dates for the same purpose; and that thereafter, to and including the thirty-first (31st) year, three (3) drawings were to take place at fixed dates for each year for the same purpose; and that thereafter, to and including the fifty-fifth (55th) year after the date of issue of such so-called bonds, two (2) drawings per year were to take place for the same purpose, at the end of which time all of said so-called bonds were, according to the plan aforesaid, to be paid.

That according to said plan the smallest amount to be paid for any of such so-called bonds selected for payment during the first year after issue was one hundred and thirty-five (135) gulden, during the second year one hundred and forty (140) gulden, and
22 during the third year one hundred and forty-five (145) gulden, and so on, increasing in amount five (5) gulden each year until the amount should reach two hundred (200) gulden, which amount then remained fixed as the minimum sum to be paid for any of the so-called bonds, whose payment should be determined by the drawings aforesaid.

That gulden and florins are denominations of money of the same value.

That under the said plan other larger amounts are provided to be paid on certain of the so-called bonds, to be determined by the drawing. Thus, during the first year the following sums are, according to said plan, to be paid on certain so-called bonds, to be determined by such drawing, to wit:

On one bond	250,000	gulden
" " "	25,000	"
" " "	15,000	"
" " "	10,000	"
On 2 bonds, each at 5,000 gulden	10,000	"
On 3 bonds, each at 2,000 gulden	6,000	"
On 6 bonds, each at 1,000 gulden	6,000	"
On 15 bonds, each at 500 gulden	7,500	"
On 30 bonds, each at 400 gulden	12,000	"

And during subsequent periods other provision is made for such larger amounts.

That all of the said so-called bonds are in the same form as said copy translation and have the same drawing and redemption plan endorsed upon them and are identical in all respects, except that the series numbers and the number thereof vary as to each so-called bond.

That deponent produces herewith the original of the so-called bond herein referred to.

23 That all the drawings heretofore referred to, by which, first, are determined the series of the so-called bonds to be paid or redeemed in each year, and, second, are determined the particular bonds in the series whose holders shall be entitled to the larger sums aforesaid, the numbers of which are drawn from the wheel, are conducted in such a way as that the determination of the numbers both for redemption and for amounts is wholly by lot or chance. The holder of each so-called bond has an equal chance with the holder of every other so-called bond, first, in securing an early payment of his so-called bond, and, second, in securing as a so-called payment for his so-called bond the very large prizes to which reference has already been made, the result in each case, as before alleged, being dependent wholly on lot or chance.

Wherefore deponent says that the scheme for the so-called redemption of the so-called bonds above referred to is a lottery, and that the depositing of the said circular and the causing thereof to be deposited as above alleged was against the peace and dignity of the United States of America and contrary to and in violation of section three thousand eight hundred and ninety-four (3894) of the Revised Statutes of the United States, as amended by the act of September nineteenth (19th), one thousand eight hundred and ninety (1890).

WM. CONARD.

Subscribed and sworn to before me this 10th day of August, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

24

U. S.
ag'st
E. H. HORNER.

AUGUST 10, 1891.

Mr. Maxwell Evarts appears for the Government; Mr. Herman Aarons appears for the defendant.

WM. CONARD, being duly sworn and examined by Mr. MAXWELL EVARTS, assistant United States attorney, says:

Q. Did Mr. Horner admit to you that on Dec. 29, 1890, he caused to be deposited in the post office at the city of New York a certain circular, to be conveyed and delivered by mail; which said circular is in all material points correctly set forth in the complaint sworn to by you *in* Aug. 10, 1891?

A. He did.

Q. Did he admit to you that this circular as set forth in the complaint referred to in my previous question was therein correctly set forth?

A. Yes, sir; he did so admit.

Q. Did Mr. Horner admit that this circular, at the time it was deposited *by* mail, was addressed to Joseph Ehrman, 17 Dearborn street, Chicago, Illinois, and that it reached its destination?

A. Yes, sir.

Q. Did Mr. Horner admit to you that the words and figures of the circular referred to in the complaint herein related to and concerned and were understood by said Joseph Ehrman to relate
25 to and concern certain so-called bonds issued by the Empire of Austria, and to state on which of said so-called bonds payments were to be made and the amount thereof?

A. He did.

Q. Did Mr. Horner admit to you that the translation of the face of one of the so-called bonds as stated in the complaint before referred to was correct?

A. He did.

Q. Did Mr. Horner admit to you that each of the so-called bonds had upon its face a series No. to — and a number in the series?

A. He did.

Q. Did Mr. Horner admit to you that the amount of indebtedness which said so-called bond purported to evidence was 100 florins?

A. He did.

Q. Did Mr. Horner admit to you that the plan of the drawing of said so-called bonds was correctly set forth in the complaint before referred to?

A. He did.

Q. Did Mr. Horner admit to you that all of the said so-called bonds were in the same form as the bond a translation of which is contained in the complaint aforementioned, and that they were

identical in all respects, except that the series and the number thereof vary as to each so-called bond?

A. He did.

Q. Did Mr. Horner admit to you that the bond now produced, marked Ex. A, J. A. S., U. S. com'r, was one of the bonds
26 referred to in the aforesaid circular?

—. ——.

Q. Did Mr. Horner admit to you that the circular now produced, and marked Ex. B, J. A. S., U. S. com'r, was the original circular caused to be deposited in Dec. 29, 1890, and to be conveyed and delivered by mail and addressed to Joseph Ehrman, 17 Dearborn St., Chicago, Illinois, and that the material part of the circular was correctly set forth in the complaint in this case?

A. He did.

Q. Did Mr. Horner admit to you that the drawings before referred to, by which are determined the series of the so-called bonds to be paid or redeemed in each year and the particular bond in the series whose holders shall be entitled to the large sums aforesaid, the numbers of which are drawn from the wheel, were conducted in such a way that the determination of the numbers both for redemption and amount is wholly by lot and chance?

A. He did.

Q. Did Mr. Horner admit to you that the holder of each so-called bond had an equal chance with the holder of every other so-called bond to secure an early payment of his so-called bond and to secure as a so-called payment for his so-called bond the very large prizes referred to in Ex. B, and that the result in each case was dependent wholly upon lot or chance?

A. He did.

Q. Did Mr. Horner admit to you that the scheme for the so-called redemption of the so-called bonds and alleged in the com-
27 plaint in this case to be a lottery was correctly and properly set forth in the complaint in the case sworn to before you on the 10th day of August, 1881?

A. He did.

Government rests.

Examination adjourned to Aug. 11th at 4 o'clock p. m.

AUG. 11, 1891.

U. S.
ag'st
E. H. HORNER.

Defence.

Same appearances.

OTTO P. EBERHARD, being sworn, testified:

Examined by Mr. AARONS:

Q. What official position do you hold in connection with the Austrian government?

A. I am at present the acting consul and vice-consul of Austro-Hungary at New York.

Q. How long have you been connected with the consul's office of that government in New York?

A. For seven years steadily.

Q. I show you Exhibit A, J. A. S., and ask you what it is.

A. It is an original government bond issued by the Empire of Austria. It represents 100 florins and is one of a series of
28 bonds aggregating forty millions of gulden, state loan. The bonds of which that is one all represent loans made to the Empire of Austria and raised by it for the purpose of raising revenues for the government in order to defray governmental expenses and carry on general state affairs. I am familiar with the bonds, of which the one shown me forms one.

OTTO P. EBERHARD.

Defendant rests.

Defendant held for grand jury in $5,000 bail.

29 U. S. Circuit Court.

In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus* and Certiorari.

I, John A. Shields, United States commissioner, do hereby, pursuant to the writ of certiorari issued herein, herewith return to the court the proceedings relating to the cause of the detention of Edward H. Horner, above named.

New York, Nov. 17th, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

(Endorsed:) U. S. circuit court. In the matter of the petition of Edward H. Horner for writs of certiorari & *habeas corpus*. Return of John A. Shields, U. S. commissioner. U. S. circuit court. Filed Nov. 17, 1891. John A. Shields, clerk.

30 At a stated term of the circuit court of the United States for the southern district of New York, held in the post-office building, in the city, county, and State of New York, on November 17th, 1891.

Present: Honorable Hoyt H. Wheeler, judge.

In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus*.

Upon reading and filing the petition of Edward H. Horner, verified November 17th, 1891, and the writs of *habeas corpus* and certiorari thereupon issued, directed to Honorable John W. Jacobus, marshal of the United States for the southern district of New York, and Honorable John A. Shields, United States commissioner, and returns to said writs made by the said marshal and said commissioner—

Now, after hearing Taylor & Parker, Esqs., counsel for said Ed-

ward H. Horner, in support of an application for the discharge of said Horner from custody, the said Horner having been produced before this court by said marshal in obedience to said writ of *habeas corpus*, and after hearing Maxwell Evarts, Esquire, assistant United States attorney, in opposition to said application and in sup-
31 port of an application to remand said Horner to custody—

It is ordered that said writ of *habeas corpus* be dismissed and that said Horner be, and he hereby is, remanded to the custody of the said John W. Jacobus, marshal of the United States for the southern district of New York.

HOYT H. WHEELER.

(Endorsed:) U. S. circuit court, S. D. N. Y. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus*. Order dismissing writ and remanding petitioner. Taylor & Parker, attorneys for E. H. Horner, 15 Wall street, New York city. U. S. circuit court. Filed Nov. 17, 1891. John A. Shields, clerk.

32 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss*:

Be it remembered that on this 19th day of November, in the year of our Lord one thousand eight hundred and ninety-one, before me, John A. Shields, a clerk of the circuit court of the United States for the southern district of New York, personally came Edward H. Horner and Moses Mehrback and severally acknowledged themselves to owe to the United States of America—that is to say, the said Edward H. Horner the sum of five thousand dollars and the said Moses Mehrback the sum of five thousand dollars, separately, to be levied and made of their respective goods and chattels, lands, and tenements to the use of the said United States, if default should be made, in the condition following, to wit:

Whereas on the 10th day of August, 1891, Edward H. Horner was arrested, charged with a violation of section 3894 of the United States Revised Statutes, and was brought before the said John A. Shields, a United States commissioner for the southern district of New York; and

Whereas the said Edward H. Horner did then and there demand an examination, which said examination was had on said 10th day of August and adjourned to the 11th day of August, 1891, upon which said last-named day said examination was concluded and a motion made by the attorney for the said Edward H. Horner that the complaint against the said Edward H. Horner should be
33 dismissed and the said Edward H. Horner discharged; and

Whereas said motion by the attorneys for the defendant was denied by the United States commissioner and the defendant held upon said 11th day of August, 1891, to await the action of the grand jury; and

Whereas on the 13th day of August, 1891, the said Edward H. Horner gave bail in the sum of five thousand dollars for his appearance at a circuit court of the United States of America for the southern district of New York, second circuit, to be held at the

United States court building, in the city of New York, on the second Wednesday of October, 1891; and

Whereas on the 17th day of November, 1891, the said Edward H. Horner was surrendered to the United States marshal for the southern district of New York by his bail heretofore taken on said 13th day of August, 1891, as hereinbefore set forth; and

Whereas, to wit, on the said 17th day of November, 1891, the said Edward H. Horner filed a petition in the U. S. circuit court of said southern district of New York for a writ of *habeas corpus* to release him from the custody of the said marshal, which said writ was issued by the said circuit court on the said 17th day of November, 1891; that afterwards and upon said 17th day of November, 1891, the said circuit court, having considered said petition and the return of the marshal thereon setting forth the cause of the
34 detention of the said Edward H. Horner, did order and direct that said writ so issued be discharged and that said Edward H. Horner be remanded to the custody of the said marshal; from which order said Edward H. Horner then and there prayed an appeal to the Supreme Court of the United States, and also then and there applied to be admitted upon recognizance until the determination of said appeal by said Supreme Court, which said motion for appeal and order to be admitted to bail was then and there allowed upon said Edward H. Horner entering into a recognizance with the United States in the sum of five thousand dollars, with sufficient surety, conditioned as herein:

Now, therefore, the condition of this recognizance is such that if upon the judgment of the Supreme Court upon said appeal from the final decision of said circuit court discharging said writ of *habeas corpus* as aforesaid the said Edward H. Horner shall personally appear before said circuit court whenever and as soon as a judgment upon the mandate of the said Supreme Court be entered in said circuit court and then and there surrender himself to the said marshal and abide the order of the said circuit and supreme courts, then this recognizance will be void; otherwise to remain in full force and virtue.

EDW. H. HORNER. [SEAL.]
MOSES MEHRBACK. [SEAL.]

Acknowledged before me the day and year first above written.
JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

35 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Moses Mehrback, of No. —, in the city of New York, being duly sworn, deposes and says that he is worth the sum of ten thousand dollars over and above all his just debts and liabilities.

MOSES MEHRBACK.

Sworn to this 19th day of November, A. D. 1881, before me—
JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

(Endorsed:) United States *vs.* Edward H. Horner. Recognizance. U. S. circuit court. Filed Nov. 19, 1891. John A. Shields, clerk.

36 In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus.*

UNITED STATES OF AMERICA,
State of New York, Southern District of New York, } *ss:*

Hermann Aaron, being duly sworn, says that he is one of the attorneys for Edward H. Horner, above named; that on December 3d, 1891, between 3 p. m. and 4 p. m., he served the annexed assignment of errors on John W. Jacobus, marshal for the southern district of New York, at the office of said marshal, at said post-office building, in the city of New York, by delivering to and leaving with John E. Kennedy, assistant to said marshal in said office and the person having charge of said office, a true copy thereof, the said marshal being at the time aforesaid absent from said office.

That the place where deponent served said paper was the regular place for the delivery of papers in said marshal's office.

HERMAN AARON.

Sworn to before me this 4th day of December, 1891.

[SEAL.] OWEN E. ABRAHAM,
Notary Public, N. Y. Co.

37 Supreme Court of the United States.

In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus.*

Afterwards, to wit, on the 14th day of December, 1891, at the October term for one thousand eight hundred and ninety-one of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes the said Edward H. Horner, by Alfred Taylor and Herman Aaron, his attorneys, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

First. That the matters charged in the complaint or information upon which the warrant herein was issued do not constitute a crime by the common law or under any statute of the United States.

Second. That the matters charged in the testimony or proceedings had before the commissioner herein do not constitute a crime by the common law or under any statutes of the United States.

Third. The matters charged in the information or complaint upon which the warrant is issued herein and in the testimony and proceedings had in pursuance thereof before the commissioner herein do not constitute a crime by the common law or under any statute of the United States.

38 Fourth. That the statute with the violation whereof the said Edward H. Horner is charged in said complaint or in-

formation is unconstitutional and void; that said statute purports to create more than one crime for the performance of the same act, and provides that a person shall be twice placed in jeopardy for the same offense, and also provides for the trial and punishment for an alleged offense against said statute in a district other than that in which the crime is committed and is an abridgement of and infringement upon the freedom of speech and of the press as guaranteed by the Constitution of the United States and is an attempt to exercise legislation which the Congress of the United States has no power to exercise, either by any of the express powers conferred upon it by the Constitution or by any of the amendments thereto, or by any incidental power which may be exercised in their behalf, and is an attempt to suppress or legislate against lotteries, which is not within the power of Congress and which is unconstitutional and void.

Fifth. That the bond or bonds mentioned in the complaint or information or proceedings before the commissioner herein are government bonds issued by the Empire of Austria and are not within the language, meaning, or purview of the statute for a violation of which said Edward H. Horner has been charged herein.

Sixth. That said bond or bonds are not "a lottery, so-called gift, concert, or similar enterprise offering prizes dependent upon lot or chance or concerning schemes devised for the purpose of obtaining money or property under false pretenses," nor are the same
39 a lottery or similar scheme or a lottery ticket or part thereof.

That the complaint or information herein and the testimony and proceedings before the commissioner herein do not nor do any of them show or allege any fact constituting an offense against or a violation of the statute for the violation of which the said Edward H. Horner has been charged herein.

Seventh. That if Austrian government bonds are to be held as included within the terms of said statute, then the same violates the provisions of the treaty between Austria and the United States of America, and such statute, so far as it relates to such Austrian government bonds, is void.

Eighth. That if Austrian government bonds be held to be included within the terms of said statute, then the said statute, so far as it relates thereto, is void, as tending to deprive the holders thereof, including said Edward H. Horner, of their property without due process of law and as unlawfully discriminating in the mail service of the United States against a lawful commodity and an article of commerce and governmental bonds of a friendly foreign power protected by treaty between the United States of America and such foreign power.

Ninth. That the commissioner or marshal of the United States for the southern district of New York had no authority to arrest or cause to be arrested the said Horner or to restrain him or cause to restrain him of his liberty.

Tenth. That the circuit court of the United States for the
40 southern district of New York erred in not discharging the said Edward H. Horner upon the return of the writ of the *habeas corpus* herein, and erred in dismissing said writ.

Wherefore the said Edward H. Horner prays that the dismissal of said writ and order of the circuit court of the United States for the southern district of New York be reversed and said circuit court of the United States be ordered to enter an order directing the discharge of the said Edward H. Horner.

ALFRED TAYLOR,
HERMAN AARON,
Attorneys for Appellant, 15 *Wall Street, New York City.*

(Endorsed:) U. S. Supreme Court. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus*. Assignments of errors. Alfred Taylor & Herman Aaron, attorneys for appellant, 15 Wall street, New York city. Service of a copy of the within assignments of errors is hereby admitted. N. Y., Nov. 17, 1891. Edward Mitchell, U. S. att'y. John A. Shields, U. S. commissioner. U. S. circuit court. Filed Dec. 5, 1891, *nunc pro tunc* as of Nov. 17, 1891. John A. Shields, clerk.

41 U. S. Circuit Court, So. Dist. of N. Y.

In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus*.

On motion of Alfred Taylor and Herman Aaron, attorneys for Edward H. Horner, and Edward Mitchell, respondent's attorney, consenting, it is—

Ordered that the bonds on appeal herein and assignment of errors be, and the same hereby are, filed herein *nunc pro tunc* as of November 17, 1891.

HOYT H. WHEELER.

Consented to.
Dec. 8th, 1891.
EDWARD MITCHELL,
U. S. Att'y.

(Endorsed:) U. S. circuit court. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus*. Order filing assignment of errors and bond *nunc pro tunc*. Taylor & Parker, attorneys for appellant, 15 Wall street, New York city. U. S. circuit court. Filed Dec. 8, 1891. John A. Shields, clerk.

42 In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus*.

UNITED STATES OF AMERICA,
State of New York, Southern District of New York, } *ss:*

Herman Aaron, being duly sworn, says that he is one of the attorneys for Edward H. Horner, above named; that on December

3d, 1891, between 3 p. m. and 4 p. m., he served the annexed appeal on John W. Jacobus, marshal for the southern district of New York, at the office of said marshal, at said post-office building, in the city of New York, by delivering to and leaving with John E. Kennedy, assistant to said marshal in said office and the person having charge of said office, a true copy thereof, the said marshal being at the time aforesaid absent from said office; that the place where deponent served said paper was the regular place for the delivery of papers in said marshal's office.

HERMAN AARON.

Sworn to before me this 4th day of December, 1891.

[SEAL.] OWEN E. ABRAHAM,
Notary Public, N. Y. Co.

43 Circuit Court of the United States for the Southern District of New York.

In the Matter of the Petition of EDWARD H. HORNER for the Writ of *Habeas Corpus*.

The above-named petitioner, Edward H. Horner, conceiving himself aggrieved by the order entered the — day of November, 1891, in the above-entitled proceeding, doth hereby appeal from the said order to the Supreme Court of the United States, and he prays that this his appeal may be allowed and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

New York, November 17th, 1891.

TAYLOR & PARKER,
Attorneys for Petitioner and Appellant,
Edward H. Horner, 15 Wall Street, New York City.

And now, to wit, on the 17th day of November, 1891, it is ordered that appeal be allowed as prayed for.

HOYT H. WHEELER.

44 (Endorsed:) U. S. circuit court, southern district of New York. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus*. Appeal to the Supreme Court of the United States. Taylor & Parker, attorneys for petitioner, 15 Wall street, New York city. Due service of copy of within is admitted. Edward Mitchell, U. S. att'y. John A. Shields, U. S. com'r. U. S. circuit court. Filed Nov. 17, 1891. John A. Shields, clerk.

45 At a stated term of the circuit court of the United States for the southern district of New York, held in the post-office building, in the city, county, and State of New York, on the 17th day of November, 1891.

Present: Hon. Hoyt H. Wheeler, judge.

In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus.*

Upon all the proceedings herein, in accordance with section 765 of the Revised Statutes of the United States, it is

Ordered that a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings herein be sent up to the United States Supreme Court by the clerk of this court on or before Monday, the 14th day of December, 1891, and that said day —, and the same hereby is, made the return day of the appeal allowed herein.

HOYT H. WHEELER.

(Endorsed:) U. S. circuit court, S. D. of N. Y. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus.* Order for return. Taylor & Parker, att'ys for petitioner, 15 Wall street, N. Y. city. U. S. circuit court. Filed Nov. 17, 1891. John A. Shields, clerk.

46 Supreme Court of the United States.

In the Matter of the Petition of EDWARD H. HORNER for Writ of *Habeas Corpus.*

EDWARD H. HORNER, Appellant and Plaintiff in Error,
against
UNITED STATES OF AMERICA *et al.*, Respondents and Defendants in Error.
} Joinder in Error.

And afterwards, to wit, on the 14th day of December, 1891, The United States of America, one of the said respondents and defendants in error, by Edward Mitchell, its attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid on in the granting of the order dismissing the writ of *habeas corpus* aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the order aforesaid in form aforesaid given be in all things affirmed, &c.

EDWARD MITCHELL,
Attorney for United States, Respondent and Defendant in Error.

47 (Endorsed:) U. S. Supreme Court. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus.* Edw. H. Horner, appellant and plaintiff in error, *vs.* United States *et al.*, respondents & defendants. Joinder in error. Edward Mitchell, United States attorney, attorney for defendant-. Due service of a copy of the within is hereby admitted. New York, December 4th, 1891. Alfred Taylor, Herman Aaron, attorney- for plaintiff, appellant, in error. U. S. circuit court. Filed Dec. 4, 1891. John A. Shields, clerk.

48 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

In the Matter of the Application of EDWARD H. HORNER for a Writ of *Habeas Corpus*.

Bond for Damages and Costs.

Know all men by these presents that we, Edward H. Horner, residing at No. 124 East 85th street, New York city, and Moses Mehrbach, residing at No. 134 East 79th street, New York city, are held and firmly bound unto the above-named The United States of America, John W. Jacobus, individually and as marshal of the United States for the southern district of New York, and John A. Shields, Esq., United States commissioner for the southern district of New York, in the sum of five hundred dollars, to be paid to the said obligees; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 17th day of November, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named Edward H. Horner has prosecuted an appeal to the Supreme Court of the United States to reverse
49 the order rendered in the above-entitled suit by the circuit court of the United States for the southern district of New York entered on November 17, 1891:

Now, therefore, the condition of this obligation is such that if the above-named Edward H. Horner shall prosecute said appeal to effect and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

EDW. H. HORNER. [SEAL.]
MOSES MEHRBACH. [SEAL.]

Sealed and delivered and taken and acknowledged this third day of December, 1891, before me—

[SEAL.] OWEN E. ABRAHAM,
Notary Public, N. Y. Co.

UNITED STATES OF AMERICA,
Southern District of New York, City and County of New York, } ss:

Moses Mehrbach, being duly sworn, says that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

MOSES MEHRBACH.

Sworn to before me this 3rd day of December, 1891.

[SEAL.] OWEN E. ABRAHAM,
Notary Public, N. Y. Co.

UNITED STATES OF AMERICA,
Southern District of New York, City and County of New York, } *ss:*

On this third day of December, one thousand eight hundred and ninety-one, before me personally came Edward H. Horner and Moses Mehrbach, to me known and known to me to be the
50 individuals mentioned and described in the foregoing instrument, and they severally acknowledged to me that they executed the same.

[SEAL.] OWEN E. ABRAHAM,
Notary Public, N. Y. Co.

(Endorsed:) U. S. Supreme Court. In the matter of the petition of Edward H. Horner for a writ of *habeas corpus.* Bond for costs. Alfred Taylor, Herman Aaron, att'ys for pet'r. Approved. Hoyt H. Wheeler. U. S. circuit court. Filed Dec. 8, 1891, *nunc pro tunc* as of Nov. 17, 1891. John A. Shields, clerk.

51 In the Matter of the Petition of EDWARD H. HORNER for a Writ of *Habeas Corpus.*

STATE OF NEW YORK,
Southern District of New York, } *ss:*

Hermann Aaron, being duly sworn, says that he is one of the attorneys for Edward H. Horner above named; that on December 3d, 1891, between 3 p. m and 4 p. m., he served the annexed citation on John W. Jacobus, marshal for the southern district of New York, at the office of said marshal, at said post-office building, in the city of New York, by delivering to and leaving with John E. Kennedy, assistant to said marshal in said office and the person having charge of said office, a true copy thereof, the said marshal being at the time aforesaid absent from said office.

That the place where deponent served said paper was the regular place for the delivery of papers in said marshal's office.

HERMAN AARON.

Sworn to before me this 4th day of December, 1891.

[SEAL.] OWEN E. ABRAHAM,
Notary Public, N. Y. Co.

52 UNITED STATES OF AMERICA, *ss:*

To the United States of America and John W. Jacobus, individually and as marshal of the United States for the southern district of New York, and John A Shields, Esq., United States commissioner for the southern district of New York, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court, to be holden at Washington on Monday, the 14th day of December, eighteen hundred and ninety-one, pursuant to an appeal taken, allowed, and filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Edward H. Horner is appellant and The United

States of America and John W. Jacobus, individually and as marshal of the United States for the southern district of New York, and John A. Shields, Esq., commissioner of the United States for the southern district of New York, are respondents, to show cause, if any there be, why the order in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated New York, November 17th, 1891.

HOYT H. WHEELER.

53 (Endorsed:) U. S. Supreme Court. Edward H. Horner, appellant, *vs.* United States of America *et al's.*, respondents. Citation. Taylor & Parker, att'ys for appellant, 15 Wall street, N. Y. city. Due service of copy of within is admitted. Edward Mitchell, U. S. att'y. John A. Shields, U. S. com'r. U. S. circuit court. Filed Nov. 17, 1891. John A. Shields, clerk.

54 UNITED STATES OF AMERICA, *Southern District of New York*, } *ss*:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 53, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the matter of the petition of Edward H. Horner for writs of *habeas corpus* and certiorari, Edward H. Horner, appellant, against The United States of America and John W. Jacobus, individually and as marshal of the United States for the southern district of New York, and John A. Shields, commissioner of the United States for the southern district of New York, respondents, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twelfth day of December, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the said United States the one hundred and sixteenth.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 14,947. S. New York C. C. U. S. Term No., 1473. Edward H. Horner, appellant, *vs.* The United States & John W. Jacobus, individually and as marshal of the U. S. for the southern district of New York, and John A. Shields, U. S. commissioner for the southern district of New York. Filed December 16th, 1891.

FILED.
JAN 5 1892
JAMES H. MCKENNEY,

CASE No. 14947.

In the Supreme Court

OF THE UNITED STATES.

October Term, 1891.

Term No. 1473.

EDWARD H. HORNER,

Appellant,

vs.

THE UNITED STATES, JOHN W. JACOBUS, individually and as Marshal of the United States for the Southern District of New York, and John A. Shields, United States Commissioner.

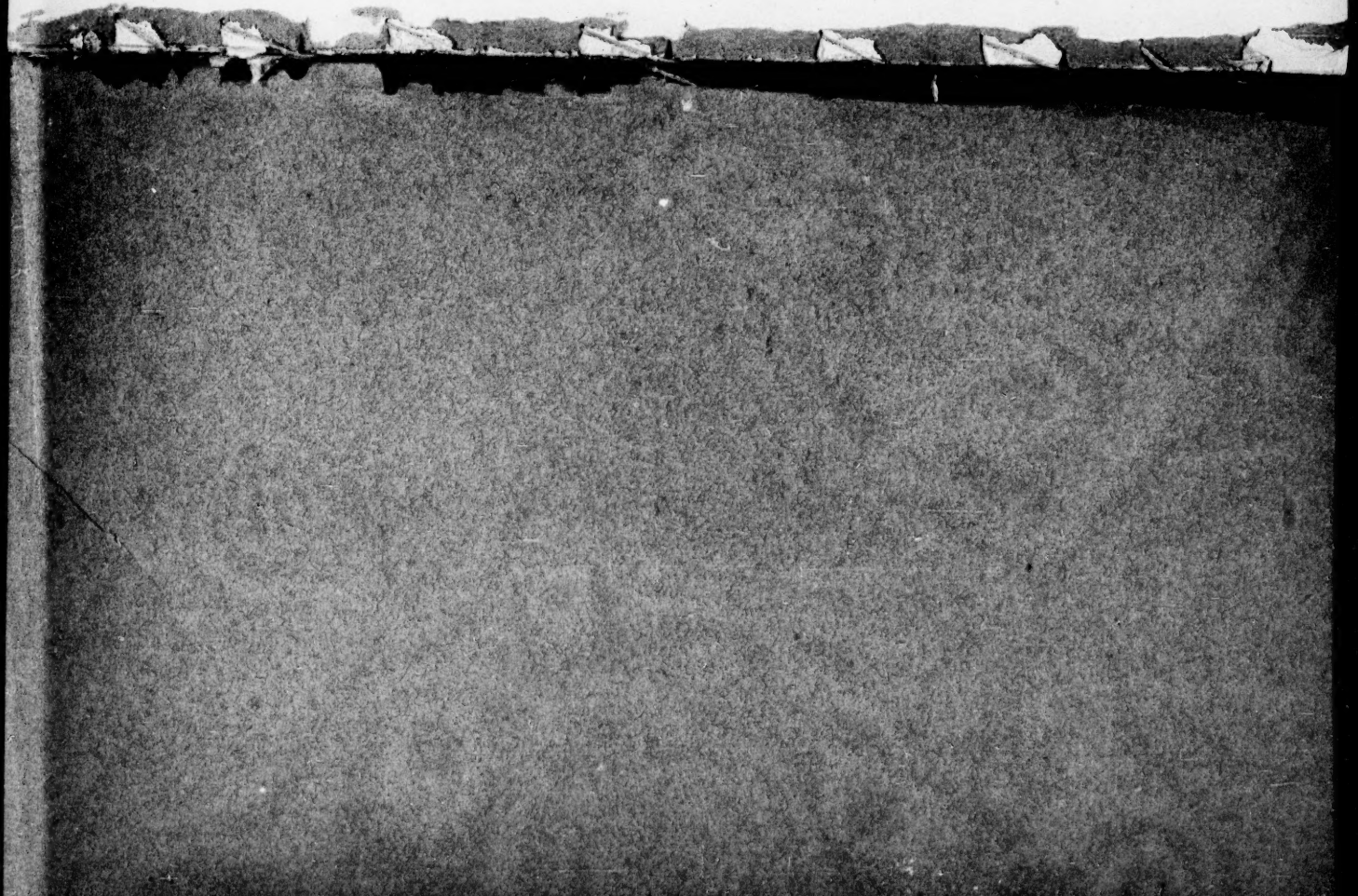
APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

ALFRED TAYLOR,
HERMAN AARON,
Counsel for Edward H. Horner,
Appellant.

New York:
HAMILTON PRINT, 12 Barclay Street. Telephone, 67 Cortlandt.

1892.



Case No. 14,947.

Supreme Court of the United States,

OCTOBER TERM, 1891.

TERM NO. 1473.

EDWARD H. HORNER,

Appellant,

against

THE UNITED STATES, JOHN W. Jacobus, individually and as Marshal of the United States for the Southern District of New York; and John A. Shields, United States Commissioner for the Southern District of New York.

BRIEF FOR APPELLANT.

Statement of the Case.

This cause comes up upon appeal of Edward H. Horner from an order made at a Stated Term of the Circuit Court of the United States, for the Southern District of New York, dismissing the writ of habeas corpus and remanding him to the custody of the Marshal.

Edward H. Horner, the accused, was arrested for an alleged violation of Section 3894 of the Revised Statutes, as amended by the Act of September, 19th, 1890.

The offense alleged is a deposit in the mails of matter prohibited by that act.

The matter alleged to have been deposited is set forth in full in the complaint by the post office inspector, and is found on pages 10, 11 and 12 of the Record.

The circular related to the redemption of Austrian Government Bonds.

It is claimed by the accused that the circular set forth in the complaint relating to the redemption of these Austrian Government Bonds, is not included in the prohibition of the Statute, and that he committed no offense by the deposit of such circular.

Upon complaint, warrant was issued by the United States Commissioner (Record, pages 3–7).

Hearing was had before the Commissioner, and the post office inspector was examined (Record, page 13), in which he testified that the accused admitted that he deposited this circular in the mail.

The testimony of the acting consul and vice-consul of Austria, in the City of New York, was taken, and one of the bonds produced and it appeared by his testimony that the bond was an original government bond issued by the empire of Austria; that it represented one hundred florins, and was one of a series of bonds aggregating forty millions of florins, State loan; and these bonds, of which the bond in question was one, all represented loans made to the Empire of Austria; which bonds were issued by the Austrian Government for the purpose of raising revenues for the government, in order to defray governmental expenses and carry on general State affairs (Record, page 15).

The bond in question reads as follows:

"Series 921. 100 Florins. Number 60.

Premium Bonds.

"One hundred florins, Austrian standard, as share of the loan of forty million florins, Austrian standard, made according to the law of November 17, 1863 (Law Journal of the Empire, No. 98), for which the amount resulting according to the plan of redemption will be paid to the bearer by the Universal State Loan Treasury."

Vienna, February 11th, 1864.

JOSEPH RUDDE,
Imperial Royal Minister, Counsellor.

[Coat of Arms.] PLENER,
Imperial Royal Minister of Justice.

For the board for controlling the State loans.

COLLERDO MAMSFELDT,
Winterstein.

"For the imperial royal universal State loan treasury.

WINTER,
Schimkowsky."

The high but rapidly decreasing rate of the bonds in the price of redemption with the additional sums paid in the awards upon the redeemed bonds—really represent interest on the loan. It is an uneven distribution of the interest. The Government distributes in this way, in payments upon the *bonds redeemed*, a sum which, in amount, is substantially the same as the interest at the usual rate would be upon the entire loan—and also pays the principal of the loan.

The bond is fixed in amount 100 florins, part of loan of forty million florins, under the Austrian law of Nov. 17, 1863.

MODE OF PAYMENT OF BONDS.

In return for this loan the Government promises "the amount resulting according to the plan of "r edemption, will be paid to the bearer by the "Universal State Loan Treasury."

No interest as such is provided. In lieu the accretions or benefits are unequal, and determined by lot at the times fixed for redemption.

All bonds will be paid in full—the first redeemed at higher rates—the later at diminishing rates.

In addition, the bonds drawn for redemption, share in the opportunity of receiving certain sums awarded by lot among the redeemed bonds.

After the hearing, the accused was committed to the custody of the Marshal (Record, page 15).

Thereupon he sued out a writ of habeas corpus to the Circuit Court of the United States (Record, pages 1 and 2).

The writs were issued (Record, page 3) and return was duly made.

By order of the Circuit Court, bearing date November 17, 1891, the writ of habeas corpus was dismissed and the accused remanded to the custody of the Marshal (Record, page 16).

From this order the accused duly appealed to this Court, which appeal was duly allowed (Record, page 21), and joinder in error was duly made by the United States (Record, page 22).

Assignment of Errors.

The error assigned and which will be relied upon, on this appeal, is two-fold:

First. That the statute, section, 3894, as amended by Act of September 19, 1890, is unconstitutional and void; and

Second. That the bonds mentioned in the complaint are government bonds of the Empire of Austria, and are not a lottery, so-called gift concert or similar enterprise, within the meaning of the statute; and that the offence whereof the accused is charged, does not constitute any violation of the statute.

POINTS.

First Point.

THE APPEAL TAKEN HEREIN IS MAINTAINABLE IN THIS COURT.

The appeal is from the final order made at a stated term of the Circuit Court, dismissing a writ of habeas corpus and remanding the appellant to the custody of the Marshal.

Before the passage of the recent Federal Appellate Court's Act of March 3, 1891, it was established that such appeal properly lay to this court, by virtue of the Act of March 3, 1885.

Carper *v.* Fitzgerald, 121 U. S., 87;
In re Palliser, 136 U. S., 262;
In re Neagle, 135 U. S., 1.

And it has been decided by this court that such appeal brought up the whole case, both law and equity, and imposes upon the Supreme Court the duty of re-examining it upon the full record as it was heard in the inferior court.

In re Neagle, 135 U. S., 1.

The question now is whether the jurisdiction of this court, in such cases, has been abrogated by the Appellate Court's Act of March 3d, 1891.

It is submitted that the jurisdiction of this court,

in such cases, remains entirely unaffected by the Act last named.

The material portions of the Act are Sections 5 and 6 and 14.

Section 5 provides for the taking of appeals, or writs of error, from the District Courts, or existing Circuit Courts, direct to the Supreme Court, in cases which are specified.

Section 6 then provides "That the Circuit Courts "of Appeals established by this Act shall exercise "appellate jurisdiction to review, by appeal or writ "of error, final decisions in the District Courts and "existing Circuit Courts, in all cases other than "those provided for in the preceding section of "this Act, *unless otherwise provided by law.*"

Section 14 first expressly repeals Section 691 of the R. S. (being the special statute, as to appeals in civil cases, where the matter in dispute exceeds the sum of $2,000), and Section 3 of the Act of February 16, 1875, and then provides:

"And all Acts and parts of Acts relating to ap-"peals, or writs of error, inconsistent with the pro-"visions for review by appeals, or writs of error, "in the preceding Sections 5 and 6 of this Act, are "hereby repealed."

Habeas corpus cases are not included in Section 5.

The question, therefore, to be determined is whether an appeal from a final decision on a writ of habeas corpus, heretofore included in Section 764 R. S., as amended March 3, 1885, is included within the cases provided for by Section 6, which cases are now to be appealed to the Circuit Court of Appeals.

If such appeal is not included in Section 6, then it is not covered by the Act at all; and Section 764, as amended March 3, 1885, not being expressly repealed, remains in force.

It will be remembered that the statute under which appeals in habeas corpus proceedings were provided, for was a special and particular legislation.

Such statute was not contained in Chapter 7 of Title XIII of the Revised Statutes, which contained the provisions as to the jurisdiction of the Circuit Court, original and appellate, nor was it contained in Chapter 11 of Title XIII of the Revised Statutes, which regulated the jurisdiction of this court. On the contrary, it was contained in, and was part and parcel of, the special legislation relating to habeas corpus, Chapter 13 of Title XIII U. S. Revised Statutes.

That these provisions relating to habeas corpus grew up as a particular legislation arising out of special circumstances and to which special attention of Congress was directed, is shown in the opinion of the Court in which the history of that legislation is considered *in re* Neagle, 135 U. S., 1, at page 70, *et seq.*

It evidently grew up out of the great regard of the law for the liberty of the citizen.

Even if the general language of Section 6 were not qualified by the words: "Unless otherwise provided by law," it would be contrary to principle and precedent for the courts to consider that a subsequent statute would, by general language, be deemed by implication to abrogate another special statute to which the particular attention of the law making power had been directed.

Ex parte Crow Dog, 109 U. S., 570.

For as was stated in the case just cited, "And the reason is," said Wood, V. C., in Fitzgerald *v.* Champenys, 30 L. J. N. S., Eq., 782; 2 Johns and Hem., 31 to 54, "That the Legislature having had "its attention directed to a special subject, and "having observed all the circumstances of the case "and provided for them, does not intend by a "general enactment afterwards to derogate from "its own act, when it makes no special mention of "its intention so to do."

But it will be noted that the general language of

Section 6 is qualified by the very significant words: "*Unless otherwise provided by law.*"

These words, certainly, cannot be assumed to have been put in the statute with the intention that they should be utterly ignored, as it is a well settled rule of construction that such construction will be adopted as will, if possible, give effect to every portion of the statute.

Sutherland on Statutory Construction,
Section 325, p. 412.

Does it not seem apparent that by qualifying the portion of the section by the words "Unless otherwise provided by law"—Congress had in mind other cases in which special provision had been made by statute for particular appeals?

Unless this be so, then the words must be deemed to have no meaning whatsoever.

Besides, the whole purport of the Appellate Court's act shows that it is intended as a revision of the general provisions of law relating to appeals, as mentioned in Chapter 7 and Chapter 11 of Title XIII U. S. Revised Stat., as it provides for the same cases, where they are mentioned, as covered by these chapters. The Act evidently did not intend to be construed as of universal application and to cover particular cases, for if it had, the saving words—"Unless otherwise provided by law," would not have been used

If there is any doubt on the question, it must be resolved against the scope of the statute, for it is an established maxim of construction that a statute in derogation of an existing statute will be strictly construed in consequence of implied repeals being regarded with disfavor.

Sutherland on Statutory Construction,
Section 139.

As above remarked, there is no express repeal of

the special statute relating to habeas corpus cases; and if it be held repealed at all, it must be so by implication.

Another reason for giving the act a very strict construction is that any act limiting the right to appeal should be strictly construed.

Kelly *v.* Sheehan, 76 N. Y., 325.

The principles of construction here contended for were fully applied by the Court in the important case *ex parte* Crow Dog, 109 U. S., 556.

In that case, by a particular act, the right was reserved to certain Indians to deal with offenses committed by one Indian against another Indian.

By a subsequent general act, it was provided that such Indians should be subject to the laws of the United States, and each individual should be protected in his rights of property, person and life.

The Court held that the general language of the statute in question did not repeal the existing special law, and said, at page 570: "The treaty of "1868 and the agreement and act of Congress of "1877, it is admitted, do not repeal it by any ex- "press words. What we have said is sufficient to "show that they do not work a repeal by necessary "implication. A meaning can be given to the "legislation in question, which the words will "bear, which is not unreasonable, which is not in- "consistent with its scope and apparent purposes, "whereby the whole may be made to stand. Im- "plied repeals are not favored. The implication "must be necessary. There must be a positive re- "pugnancy between the provisions of the new laws "and those of the old."'

Wood *v.* United States, 16 Peters, 342.
Davies *v.* Fairbairn, 3 How., 636.
United States *v.* Tynen, 11 Wall, 88.
State *v.* Stoll, 17 Wall., 425.

"The language of the exception is special and

" express; the words relied on as a repeal are gen-
" eral and inconclusive. The rule is, *generalia spe-*
" *cialibus non derogant.*

"'The general principle to be applied,' said
" Bovill, *C. J.*, in Thorpe *v.* Adams, 1 R., 6 C. P.,
" 135, 'to the construction of acts of Parliament is
" that a general act is not to be construed to repeal
" a previous particular act, unless there is some
" express reference to the previous legislation in
" the two acts standing together. 'And the rea-
" son is,' said Wood, V. C., in Fitzgerald *v.* Champenys, 30 L. J. N. S. Eq., 782, 2 Johns. and Hem., 31–34, 'that the Legislature having had its atten-
" tion directed to a special subject, and having ob-
" served all the circumstances of the case and pro-
" vided for them, does not intend, by a general en-
" actment afterwards, to derogate from its own act
" when it makes no special mention of its intention
" so to do."

Second Point.

IT IS ALSO SUBMITTED THAT SECTION 3894 OF U. S. REVISED STATUTES, UNDER WHICH THE PROCEEDINGS AGAINST THE APPELLANT WERE TAKEN, IS UNCONSTITUTIONAL.

The arguments under this head are now before the Court, in the able and comprehensive briefs submitted *in re* Dupre and *in re* Rapier, and nothing further need be said on the subject.

Third Point.

IT IS NOT A PROPER TEST TO APPLY TO

THE GOVERNMENT BONDS IN QUESTION, WHETHER OR NOT THEY HAVE AN ELEMENT OF CHANCE IN THEM; BUT THE TEST SHOULD BE, ARE THEY A "LOTTERY OR SIMILAR SCHEME?"

Section 3894 of the Revised Statutes as amended, under which appellant was apprehended, reads so far as is material, as follows:

"No letter, postal card, or circular concerning any "lottery, so called gift concert, or other similar en- "terprise offering prizes dependent upon lot or "chance, or concerning schemes devised for the pur- "pose of obtaining money or property under false "pretenses, and no list of the drawings at any lot- "tery or similar scheme, and no lottery ticket or part "thereof, and no check, draft, bill, money, postal "note, or money order for the purchase of any ticket, "tickets or part thereof, or of any share or of any "chance in any such lottery or gift enterprise, shall "be carried in the mail, or delivered at or through "any post office or branch thereof, or by any letter "carrier:

"Nor shall any newspaper, circular, pamphlet, "or publication of any kind, containing any adver- "tisement of any lottery or gift enterprise of any "kind offering prizes dependent upon lot or chance, "or containing any list of prizes awarded at the "drawings of any such lottery or gift enterprise, "whether said list is of any part, or of all, of the "drawing, be carried in the mail, or delivered by "any post master or letter carrier."

The only language of the act which it can be claimed extends to the bonds in question is, "No circular concerning any lottery, so-called gift concert or similar enterprise, offering prizes dependent upon lot or chance." * * * * * * * "No list of drawings at any lottery or similar "scheme;" "No lottery ticket or part thereof;" and "No circular containing any list of prizes

"awarded at the drawings of any such lottery or "gift enterprise."

The bonds in question are clearly "No gift concerts or similar enterprises."

The only question, therefore, involved in this case is, whether the government bonds which are above described, are "A lottery or similar scheme?"

It will be readily conceded that a lottery is one form or species of gaming.

Bishop on Statutory Crimes, Section 953;
Thomas *v.* People, 59 Ill., 160;
Bell *v.* The State, 5 Sneed, 509.

"A lottery is a 'game of hazard,' in which small sums are ventured for the chance of obtaining greater."

Worcester's Dict.

It is well to bear in mind at the outset that not all gaming is within the purview of the act in question.

The only form of gaming, concerning which matter is barred from the mail, are *lotteries*, *gift concerts* or similar enterprises.

There are many other forms of gaming than these two which are enumerated; such as faro, shuffleboard, pico, keno, baccarat, French pool, draw poker, bagatelle, and numerous others, quite a number of which will be found enumerated in 5 Criminal Law Magazine, 533.

It is perfectly apparent that letters, circulars, etc., relating to other forms or species of gaming than the two enumerated in the statute in question, may be mailed without violating the statute.

Thus it would be lawful to mail a letter or circular "concerning" faro or French pool, baccarat, or keno, orother games of chance than those specifically named in the statute.

This is obvious, from the language of the statute, without requiring the citation of any rule of interpretation.

Should there be the slightest question upon this point, however, the familiar rule that penal statutes will be strictly construed, and the maxim, *inclusio unius est exclusio alterius*, will dispose of any doubt.

It is important to bear in mind the above limitations of the statute in order to avoid a tendency of including, within the prohibition of the statute, everything which may have the *element of chance connected with it*, and of making the element of chance *the test* by which the statute is to be interpreted.

The element of chance is not the test, for, as we have shown above, even *games of chance*, whose sole purpose is gambling, are not reached by the statute, but matter pertaining to the same may be lawfully mailed.

In many of the States in which lotteries are prohibited the Legislatures recognize the fact that there are other species of gaming which they desire to suppress, and accordingly provide for such other species in language which is very extensive in its scope.

Thus, the Maryland statute prohibits the sale of "lottery tickets" and "what are called policies, "certificates, or anything by which the vendor or "other person promises or guarantees that any "particular number, character, ticket or certificate "shall, in any event, or on the happening of any "contingency, entitle the purchaser or holder to "receive money, property, or evidence of debt." And also of "All devices and contrivances designed "to evade the provisions of the preceding section."

Maryland Stat., Art. 27, Secs. 172, 178 and 173.

A further examinatiou of Article 27 of the Mary-

land Statutes will show how the statute aims to cover all games of chance.

Such, however, is not what Congress did in passing the statute in question; and instead, therefore, of proceeding as a court would be disposed to do under an extended and wide-sweeping statute, such as that of Maryland, by applying the element of chance as a test, the test here must be not whether the bonds in question have an element of chance, but whether they are *a lottery or similar scheme.*

Fourth Point

THE GOVERNMENT BONDS IN QUESTION ARE NOT "A LOTTERY OR SIMILAR SCHEME."

It is shown in the complaint (Record, pp. 4 and 5), and also by the testimony of the Austrian Vice-Consul (Record, p. 15), and it also appears upon the face of the bonds in question (Record, pp. 10 and 11), that they were issued by the Empire of Austria for a loan of forty million Florins, according to a law of November 19, 1863; and that the loan was used for the purpose of raising revenues for the government in order to defray governmental expenses, and carry on general state affairs (Record, p. 15).

The bond in question represents one hundred Florins of such loan. And the government promises to pay the same to bearer according to the plan of redemption upon said bond.

As is shown by the complaint, all of the bonds are bound to be redeemed within fifty-five years from the date of their issue (Record, p. 5).

During the first year the government agrees to pay as the minimum amount for any bond redeemed, one hundred and thirty-five Gulden, or Florins, during the second year, one hundred and

forty Gulden or Florins, during the third year one hundred and forty-five Gulden or Florins; and so on increasing in amount five Gulden or Florins each year, until the minimum amount to be paid by the government on each bond redeemed is two hundred Gulden or Florins (Record, p. 5).

Besides these fixed amounts, the government also agrees to distribute certain larger premiums or prizes.

The primal only object is to raise money to carry on the government.

We assume that it will be admitted that this loan is not a lottery in the sense in which such an enterprise is usually carried on or popularly understood. It is not a lottery such as the Louisisna Lottery against which the statute in question was aimed.

House Rep. No. 2844, 1st Sess. 51st Cong., Sen. No. 1579, *ibid.*

It is not a state or government lottery, such as the state and government lotteries of history.

There is no rule of interpretation so obviously founded in reason and justice as that which requires a penal statute to be interpreted according to its popular meaning?

An infraction of such a statute is visited with fine and imprisonment upon the common people; and it would be a palpable opression for the courts to give refined meanings to statutes, different from those which they would convey to the common people, and thus punish and degrade a citizen for the violation of a law which did not, in the popular meaning of its language, make the act complained of a crime.

In U. S. *v.* Comerford, 25 Fed. Rep., p. 904, the Court says:

"We have been taught to believe that it was the "greatest injustice towards the common people of "old Rome when the laws they were commanded "to obey, under Caligula, were written in small

"characters, and hung upon high pillars, thus "more effectually to ensnare the people. How "much advantage may we justly claim over the "old Roman, if our criminal laws are so obscurely "written that one cannot tell when he is violating "them? If the rule contended for here is to be ap- "plied to the defendant, he will be put upon trial "for an act which he could not by perusing the "law have ascertained was an offense. My own "sense of justice revolts at the idea. It is not in "keeping with the genius of our institutions, and I "cannot give it my sanction."

Apply that principle to the case of the bonds in question, and all basis for the prosecution in this case, will vanish

Let us suppose that the Austrian Government should desire to set up a State lottery, as it and many other governments, including our own, have done. It would sell regular lottery shares; have an early drawing of prizes, and distribute money which it realized from the sale of the shares, less a profit to itself, to the lucky winner.

How essentially different is such a scheme from the government loan for which the bonds in question were issued.

The meaning of a lottery is as well known to the common people as to the courts.

Nearly all governments have had at one time or another State lotteries, and the patrons of these lotteries were the common people; and the signification of the term lottery is fully known to them.

Ask a subject of Austria, who invests his savings by loaning them to his government upon its bond whether that bond is a lottery ticket, and he will unhesitatingly answer, No. Ask a citizen of this country whether the bond of the Empire of Austria, issued upon a loan of money to it for govern ment expenditures, is a lottery ticket, and he will promptly answer, No.

It is not like the Louisiana lottery; it is not like a State lottery which a government sets up when it desires to set up a lottery.

In order to hold the government loan in question to be a lottery, the Court must, of course, find that it is in fact, and in its gist and essence, a lottery; to wit, a lottery as a business. Such is the meaning that universally attaches to lotteries, to wit, that they are founded, having as their essential feature the business of selling shares, and of distributing *from the proceeds* prizes among winners.

The money received from the sale of shares is used to maintain the lottery as a business; and it is *the* fund out of which the prizes are paid.

In the case of the bonds in question, it is conceded (Record, p. 5) that the money received by the government upon the loan in question was paid out for defraying governmental expenses. It is not in the slightest degree used as a fund out of which to pay prizes or to repay the loan; but the money for such purpose is raised by taxation, and the usual means of raising revenue:

Has there ever been known a lottery which did not depend for its maintenance upon the moneys collected from shares? Such is the essential business feature of a lottery.

In the case of the government loan in question this feature is entirely absent; the money raised as a loan was actually paid out for governmental expenses, as money raised on governmental loans invariably is, and shows the transaction to be *essentially and primarily* a loan, and not a lottery.

We can conceive of ingenious devices adopted by lottery promoters for the purpose of cloaking a lottery enterprise in a false garb, so as to evade laws directed against them.

But it would be idle we submit to impute to a Sovereign Power like the Empire of Austria the intention of adopting a subterfuge for the purpose

of evading its own law, when, by the exercise of its Sovereign Will at any moment, it can change the law.

It would also be idle to impute to the Austrian Government (one of the great powers with which our Government is on friendly intercourse) the opprobrius charge of adopting an artful device to evade the statutes of the United States against lotteries.

There is not the slightest evidence of such design; and in the nature of things there cannot be; and comity, we may assume, would forbid us from indulging in any such discourtesy. But we are not left in the slightest doubt on the subject; for, as appears by the bonds, they were issued and the loan to the Austrian Goverment was made in 1864.

This was many years prior to the amendment of Section 3894, and many years prior to the enactment of the original section which was passed in 1872.

It must, therefore, be held that the loan to the Austrian Goverment was what it purported to be, a legitimate, *bona fide* loan.

As we have above seen, a lottery is but a species of gaming.

If we are therefore called upon to brand the loan in question as a lottery, the Court will have to stigmatize a government loan of a great European power as a game.

We apprehend that the Court will hesitate before laying the very highest and vital exercise of governmental power, upon which depends the very existence of government and the maintenance of law, under the ban of a game.

The same reasons will impel such hesitancy as prevailed with the Court in Woodcock *v.* McQueen, (11 Ind., 14), in refusing to characterize a State election as a game.

In that case, the Statute provided for the punish-

ment of persons betting upon the result of any game; and the case before the Court was that of a person betting on an election. The Court said: "In other words, is an election in a popular gov- "ernment, held pursuant to the constitution and "laws of such Government, *a game, in the legal "sense of that term?* We had not supposed that "such was the theory of our elections. A game "we had looked upon as a thing of chance, skill or "trick—involving no principle, no truth—as vis- "cious in itself, or tending to vice--a thing played "by gamesters, with their own limbs, or with im- "plements, or instruments, having no wills of their "own, but simply doing that of the respective "players; while an election, we had regarded as "being a thing done pursuant to law, in which all "the actors were agents, possessing free wills of "their own, judgments, and motives which de- "termine their course of action, guided by fixed "principles and views pertaining to the general "welfare which they desired to promote. And it "still seems to us that to regard candidates and "politicians in our elections as players of games "of chance, and the people as implements with "which they play them, would be derogatory and "degrading to the character of our government, "and of pernicious influence, as tending to destroy "that high tone of moral and political principle "and patriotism, and sense of dignity which should "ever be fostered and upheld among the people."

If we have succeeded, as we believe we have, in showing that the main and primary object and feature of the government loan in question, is that of a loan and not a lottery, there remains then the further question, whether because it has attached to it as a subsidiary feature an element which is like that of a lottery, it becomes transformed into a lottery?

As a matter of reasoning, we cannot conceive how, if in a large and main body there exists a small and completely subordinate element of a dif-

ferent characteristic from the main body, the whole body will, therefore, be deemed transformed into such small and subordinate element.

It would be like saying that the Government of the United States, because the Federal Judges are appointed by the President and not elected by the People, is not a government of popular elections.

An exactly parallel case to the one at bar would be that arising under a statute which prohibits concerts on Sundays; and it should be urged that the law applied to church services.

The essential feature of a concert is singing before an assembly. A church service has in it one feature which is exactly like the characteristic one in the concert, to wit, singing before an assembly of people.

Yet it would be manifestly absurd to say that, because the church service happened to have a feature which was the same as a concert, therefore, it should be characterized as a concert.

So in the case at bar, it cannot be maintained, we submit, that, because a *bona fide* government loan happens to have as one of its features something which is akin to the characteristic feature of a lottery, therefore it becomes a lottery.

The immediate repelling of the claim to bring a church service under the head of a concert, cannot be claimed to be due to any superior feeling of the sacredness of the church service to that which would be felt when it is sought to bring a government loan under the ban; for, in the eye of the Municipal law, there can be no higher or more sacred object than the raising of a government loan, for upon it all government and all law depend.

Let it be supposed that a person in good faith should honestly borrow a large sum of money from another with which to carry on a lawful business, not a lottery business, and should make an agreement for repaying the same, and also agree

that under certain contingencies dependent upon chance he would pay some additional premium; and that the transaction was not a cloak for carrying on a lottery scheme.

It certainly would not be held that that he was engaged in a lottery scheme.

This is precisely such a transaction. The government borrows in good faith, as is undisputed, a large sum of money to carry on a lawful business, to wit, the affairs of the government. The whole loan represents forty millions of florins. Each particular bond represents a part of such grand loan; and the humble loaner of one hundred florins, it is submitted, stands, in the eye of the law, as favorably as if he loaned the government the entire forty millions of florins.

It may be said that some lottery company might, if these bonds are upheld, carry on its business in the form of a small loan, which it would at all events return, and also offer larger prizes.

The answer is, that in whatever guise they would carry on their business, it would be palpable that it was a subterfuge, and that the object of the alleged loan was not to carry on a legitimate business, but only a lottery.

Any attempted evasion of the law by a lottery company upon the plan of the bonds in question could be easily detected. Besides, it would be utterly impracticable; for what lottery company could borrow money or sell tickets in which a right of repayment or a prize might not be determined for fifty-five years? A lottery speculator wishes to invest a small sum for a chance of immediately winning a large sum; and he is quite the opposite of a person to tie up his money for possibly two generations.

The whole spirit of the loan in question is that of a prudential ultra conservative investment, in marked contrast to the reckless gambling "win or lose" spirit of a lottery speculation.

Similar bonds to the ones in question came up for consideration by the Court of Appeals of the State of New York, in Kohn *v.* Koehler, 96 N. Y., 362.

The statutes of that State were much more comprehensive than is the Federal statute we are now considering, and yet the Court held that the bonds did not come within the purview of the statute, and held that neither they nor the loans they represented were lotteries.

The New York statute existing at the time, Sections 26 and 32 of Article 4 of Title 8 of Part I, Chap. 20 of the Revised Statutes, provided as follows:

Section 26. "Every lottery game or device of "chance in the nature of a lottery, by whatever "name it may be called, other than such as have "been authorized by law, shall be deemed unlaw-"ful, and a common and public nuisance."

Section 32. "Any person who shall purchase any "share, interest, ticket, certificate of any share or "interest, or part of a ticket, or any paper or in-"strument purporting to be a ticket, or share or "interest in any ticket, or purporting to be a cer-"tificate of any share or interest in any ticket, or "in any portion of any illegal lottery, may sue "for and recover double the sum of money and "double the value of any goods or things in action "which he may have paid and delivered for such "purpose, with double costs of suit."

In addition to these statutes, the Constitution of the State of New York (Article I, Section 10), adopted 1846, provided: "Nor shall any lottery "hereafter be authorized, or any sale of lottery "tickets allowed within this State."

The plaintiff purchased from the defendant one of the bonds in question, and thereupon, under the statute, sued to recover the double penalty.

The Court said, after fully describing the bonds:

"The bond in question provides for the payment "of the sum of one hundred gulden by the Austrian "Government, in accordance with the conditions en-

" dorsed on the back of the same, together with one-
" fifth part of any such sum as may be allotted to the
" prize number of the bond, which sum must amount
" to at least one hundred and twenty gulden, with
" interest as provided.

" Under the rules and regulations endorsed on the
" bond, relating to the drawiug and redemption of
" the bonds, of which the one in question constituted
" a part, provision is made for the drawing of the
" bonds by a division into series, and the drawing of
" a certain number of series tickets to be deposited in
" a wheel to await the drawing of the prize numbers.
" At a time named, a drawing is to be had from the
" series numbers, and provision is also made for the
" drawing of the prize numbers deposited in another
" and separate wheel, and the last named drawing
" designates the numbers which are entitled to
" prizes, which prizes vary from six hundred gulden
" to three hundred thousand gulden. Under the
" terms of the loan for which the bonds were issued,
" the holder is entitled to receive his principal and
" interest and a premium of twenty per cent., and
" what is termed a prize, if, by the drawing provided
" for, he becomes entitled to the same. The bonds
" referred to were issued by the Austrian Govern-
" ment for the purpose of obtaining a loan of money,
" and the holders or owners receive the same upon
" payment of the amount of principal therein
" named, or of the market value thereof. The evi-
" dent object and pur pose of the Government in issu-
" ing the bonds was to obtain money for its own use
" and benefit. According to the true interpretation
" of the instrument, the Government, upon receiving
" the money, promises to pay the principal, interest
" and premium named, and in addition, any sum
" which may be drawn by the holder of the bond,
" in accordance with the rules and regulations en-
" dorsed upon the same. This additional sum de-
" pends upon a contingency which is to be decided
" by lot or chance. Independent of this, the
" amount and terms are fixed by the conditions of

"are schemes where money is paid for the chance
"of receiving money in return. As a general rule
"the money thus paid, in case a prize is not drawn,
"is lost, and no return had for the same. The pur-
"chaser may draw a prize, or may draw a blank,
"and he thus hazards what he has paid upon the
"chances incident to a drawing by lot. The evils
"attending a system of lotteries, and against which
"the laws of this State are aimed, consist in the
"risk which people are willing to take in hazard
"ing their money, with a chance of losing the same
"without any benefit or advantage whatsoever,
"and with but a remote prospect of gain. This
"was a species of gambling, which inflicted
"serious injury upon certain classes of the com.
"munity, which prompted the prohibition of lot-
"teries in the constitution of this State, and the
"enactment of severe laws against their operation.
"A Government bond, of the character of the one
"which is involved in this action, does not come
"within the mischief intended to be remedied, or
"within the scope and purpose of the enactments
"against lotteries. Such an instrument is not
"named, nor is it within the purview of the statute
"or the intention of the lawmakers. These bonds
"have been issued by several of the governments
"of other countries, and in no sense can they be
"regarded as being within the inhibition of the
"statutes of this State, which were intended to
"suppress lotteries, and to prevent citizens from
"indulging in this species of gambling. The bond
"in question was an evidence of debt, and a public
"security of a foreign government, exposed for
"sale, the same as other securities upon which
"money is loaned, and its sale did not violate
"the provisions of the statute already cited. It
"was not raffled for, or distributed by lot or chance,
"and it cannot be said that the purchase of the
"same by the plaintiff was within the provisions
"of Section 32 of 1 R. S., 665. Nor was the issue

"of the bond or its sale a gift enterprise within the "provisions of the Penal Code already cited."

The same question also arose in the Supreme Court of California, under a similar bond in the case of *ex parte* Shorbet, 70 California, 632, under a statute more stringent than the Federal Statute which is in question in this case; and the court approved the ruling in Kohn *v.* Kohler (*supra*) and decided accordingly.

In March, 1878, one Oscar Bauman, was arrested in New York for sending circulars relating to Austrian bonds through the mails. The statute, so far as the question here at issue is concerned, was in effect the same. The answer was brought before United States Commissioner Osborne, who discharged the prisoner, and announced the following opinion.

"As the case presents itself upon this evidence "the documents purporting to have been issued "under a lottery plan, or under circulars describing "a lottery plan, have been proven by competent "witnesses to be genuine bonds, or documents "issued as securities of the Austrian Government, "or rather, one of the cities of the Austrian Gover- "ment—the City of Vienna. The proof shows that "these bonds, issued by the City of Vienna, are "guaranted by the Austrian Government. It also "appears that the purchase price of one of the bonds "produced here was about eighty dollars,—that "they have a market value in the European mar- "kets,—that they are dealt in here by the defendant, "or by the firm with which he is connected, they "having purchased them to sell again at, it appears, "some advance on the price he pays. But the "point to be determined here is, does the purchaser "run any risk of losing the money that he pays "for the bond, provided he pays no more for it "than its face value? The evidence is clear that he "pays no more for it than its face value, and that "at the time of its redemption, he gets the face "value of his bond returned to him, with interest.

"It further appears that there is a chance that, "under a scheme provided by the government—a "system of drawings controlled by the finance "minister of Austria—the number of his bond "may draw a prize. But the element of fraud "is entirely out of the case, because the purchaser "gets a *quid pro quo* for his investment, whether "he gets a prize or not. There is no chance "about it. The only chance he has of losing his "money is that, if he pays more for his bond than "the face value, he may not be able to get his "money, provided the bond gets into market.

"The complaint is dismissed and the prisoner "discharged."

On July 10, 1884, Judge Benedict, presiding in the Circuit Court of the United States for the Southern District of New York, on motion of the United States District Attorney, ordered a *nolle prosequi* to be entered upon indictments found against employees of the International Banking Company for sending circulars similar to this one through the mails. The learned judge said he had read the opinion of Judge Miller, and fully concurred with him in his decision that the government bonds sold by the International Banking Company are not lottery tickets, but valid government bonds. This had been decided by United States Commissioner Osborn, as far back as March 8, 1878, in the case of the United States against Oscar Baumann, who was then in the employ of the International Banking Company.

These are the only decisions with which we are familiar, except two cases in which an opposite conclusion was reached; one of them, the case of Ballak against the State of Maryland.

For the reasons heretofore presented, that case, however, cannot, we submit, be followed in the case at bar.

Besides, it will be seen upon inspection that the decision was evidently influenced by the very wide

sweeping provisions of the Maryland statutes, making the element of chance the test, which left it to the power of the Court to declare almost any transaction prohibited, because it had an element of chance in it.

The other case is United States against Zeisler, 30 Federal Reporter, 499.

For the reasons above given and upon the authorities cited, it is submitted, that the decision in that case was erroneous.

If there be any doubt as to the applicability of the statute, it must be resolved against the prosecution, for it is well settled that a penal statute must be strictly construed, and that any doubt arising under it must be resolved in favor of the accused.

Sutherland on Statutory Construction,
Section 208, and cases cited.

"When a law imposes a punishment which acts "upon an offender alone and not as a reparation to "the party injured, and where it is entirely within "the discretion of the law giver, it will not be pre- "sumed that he intended it should extend furt her "than is expressed; and humanity would require "that it should be so limited in construction."

Sutherland on Statutory Construction,
Section 208.
State against Stephenson, 2 Baily, 334.

In U. S. *v.* Comerford, 25 Fed. Rep., 904, the Court says:

"It may be well to consider the established rules "for interpreting criminal statutes.

"In the case of U. S. *v.* Clayton, 2 Dill., 228, the "rule is well stated, and authorities cited in the "case are contained in 12 Myer's Fed. Dec. 86, Sec. "345. Section 346 reads as follows:

"The principle that the legislative intent is to be "found, if possible, in the enactment itself, and

"that the statutes are not to be extended by con-
"struction to cases not fairly and clearly embraced
"in their terms, is one of great importance to the
"citizen. The Courts have no power to create
"offenses, but if, by a latitudinarian construction,
"they construe cases not provided for to be within
"the legislative enactments, it is manifest that the
"safety and liberty of the citizen are put in peril,
"and that the legislative domain has been invaded.
"Of course, the enactment is not to be frittered
"away by false construction, by metaphysical
"niceties, or mere verbal and sharp criticism;
"nevertheless, the doctrine is fundamental in
"English and American law that there can be no
"constructive offenses; that before man can be
"punished, his case must be plainly and unmis-
"takably within the statute; and if there be any
"fair doubt whether the statute embraces it, that
"doubt is to be resolved in favor of the accused.
"These principles admit of no dispute, and have
"often been declared by the highest courts, and by
"no tribunal more clearly than the Supreme Court
"of the United States."

Cases cited: U. S. *v.* Morris, 14 Pet., 464; U. S. *v.* Wiltberger, 5 Weed, 76; Ferrett *v.* Atwill, 1 Blatchf., 151-156; Myers *v.* Foster, 6 Cow., 567; Daggett *v.* State, 4 Conn., 61.

Fifth Point.

THE ORDER OF THE CIRCUIT COURT SHOULD BE REVERSED AND THE APPELLANT DISCHARGED FROM CUSTODY.

Respectfully submitted,

ALFRED TAYLOR,
HERMAN AARON,
Counsel for Appellant.

FILED,
JAN 7 1892
JAMES H. McKENNEY,
CLERK.

CASE NO. 14947.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

EDWARD H. HORNER, APPELLANT,
vs.
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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

This is an appeal from an order of the circuit court for the southern district of New York, denying to the appellant a discharge under his petition for a writ of habeas

corpus and remanding him to custody. Horner had been committed by a United States commissioner to await the action of the grand jury on a charge of having violated section 3894 of the Revised Statutes of the United States, amended by the act of September 19, 1890 (Rec., p. 7). He thereupon filed his petition for a writ of habeas corpus in the circuit court to be discharged from the custody of the marshal to which he had been committed to await the action of the grand jury, under the commissioner's order. The evidence upon which the commissioner took action, and which was before the circuit court, will be found on pages 9, 10, 11, 12, 13, 14, and 15 of the record.

ASSIGNMENTS OF ERROR.

The assignments of error by the counsel for the appellant will be found on pages 18 and 19 of the record. The first, second, third, fourth, fifth, and sixth allege that the facts proven do not constitute a crime within section 3894, as amended.

The fourth assignment of error is based on the claim that section 3894, as amended, is unconstitutional.

The seventh assignment of error is based on the contention that section 3894 is in violation of a treaty between Austria and the United States, and is, therefore, void.

The eighth assignment of error is that the statute is unconstitutional.

ARGUMENT.

We do not propose in this brief to rediscuss any of the features of the new anti-lottery law which are claimed to be in violation of the Constitution and which are now under consideration by this court in former cases. This makes it unnecessary to discuss the fourth and eighth assignments of error.

The seventh assignment of error, averring that section 3894, as amended, if enforced against the defendant in this case would violate the treaty with Austria, has nothing in it. A statute which violates a treaty is not void; it is the law, and the treaty must yield to it. The obligation of the treaty is not binding on the court if Congress sees fit to repudiate it. This has been so often decided by the court as not to require citation of authority.

I.

The other assignments of error are directed to the question whether the complaint is sufficient to constitute a violation of section 3894, as amended. These assignments of error, it is respectfully submitted, the court has no jurisdiction to consider. The appeal in this case was allowed November 17, 1891 (Record, page 25), so that the new circuit court of appeals act was then in full force and operation. Section 5 of that act provides that appeals or writs of error may be taken from the district court or from the existing circuit court direct to the Supreme Court in the following cases: first,

and therefore the decision of the circuit court of appeals is final, and there would be no appeal to this court in any event where no constitutional question is presented. But whether the decision of the circuit court of appeals is final or not, it is very clear that the appeal must first be taken to the circuit court of appeals, and not to this court. It therefore follows that in a habeas corpus case, appealed directly from a circuit court, no question can be considered here except a jurisdictional or a constitutional question.

II.

Let us concede, however, that this court has jurisdiction under the act of 1885 to consider the sufficiency of the complaint. The complaint charges that Horner deposited in the post-office in New York City a circular addressed to a person in Chicago, Ill., and that the circular is as set forth on page 10 of the record. It contains a list of prizes awarded to certain holders of so-called Austrian State bonds. The question is whether the plan adopted by the Austrian Government in the issuance of the so-called bonds, and for their redemption, is a lottery within the meaning of section 3894 as amended. The Government issued 400,000 of these so-called premium bonds, with a nominal par value of 100 florins each. The bonds are divided into series, and each bond in a series has a number. A part of these bonds were redeemed five times a year up to April, 1874. Thereafter, and until 1883, the redemptions were four times a year; and thereafter, and until 1895, were to be three times a

year; and thereafter, and until 1919, the redemptions were to be twice a year, at the end of which time all the bonds will be redeemed. The bonds are divided into as many series as there are redemptions. The series to be redeemed at any time is determined by depositing in a wheel the numbers of all the series unredeemed, and drawing therefrom by lot or chance the series number. When the series to be redeemed is thus determined, all the numbers in the series are deposited in a wheel, and a second drawing takes place. The numbers which are drawn by lot or chance entitle the holders of the corresponding bonds to large prizes, running from 400 florins to 50,000 florins.

All bonds selected for payment during the first year after issue receive 135 gulden; during the second year, 140 gulden; the third year, 145 gulden; and so on, increasing in amount 5 gulden each year until the amount shall reach 200 gulden, which then remains as the minimum sum to be paid for any of the so-called bonds on redemption. The Austrian Government sells these bonds for what it can get for them. Naturally the price paid, therefore, is a consideration not only for the return of the face of the bond and interest thereon, but also for the very large prizes which under the plan of redemption every bondholder has an equal chance of drawing by lot. Section 3894, as amended, denounces as a crime the deposit in the mail of any "letter, postal card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance," and the depositing of any "newspaper, circular, pamphlet,

or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise."

It will not be denied that this so-called loan includes in it, as a very essential part thereof, a scheme for the distribution of prizes by lot or chance. Webster defines a lottery to be a scheme for the distribution of prizes by lot or chance. This is what, in common language, a lottery is understood to be. We submit that the plan of the Austrian Government is a scheme for the distribution of prizes by lot or chance. We are wholly unable to understand the process of reasoning by which it is sought to distinguish the Austrian premium bonds from a lottery. A lottery is said to be a game. It is a game only because the distribution of its prizes is made to depend upon the drawing of lots or the turning of a wheel.

If the Austrian Government chooses to use such a gaming device in the distribution of prizes, then it is engaged in a game. It is said that the primal and only object is to raise money to carry on the Government. It is a novel argument that a lottery is not a lottery because the money which it produces to its promoters and proprietors is to be devoted to a public purpose. The purpose to which money is devoted after it has been obtained by the forbidden method can not legitimize the method if that has in it all the elements of a lottery.

Again, it is said that it is not a lottery because the money paid for the bonds was not used by the Government to pay prizes; that it is an essential feature of a lottery

that the prizes should be paid from the proceeds of the tickets. There is absolutely nothing to show that the prizes are not paid out of the proceeds of these bonds. They doubtless are, but whether they are or are not is entirely immaterial. The Austrian Government receives the money and the Austrian Government pays the prizes, and whether it pays them out of one pocket or another, does not affect that which makes the lottery, namely, the deposit of a small amount of money for the purpose of obtaining a chance to draw by lot a very large sum of money.

Now, what of the authorities? The *case of Kohn* vs. *Koehler* (96 N. Y., 362) is, we admit, an authority in favor of the contention of the appellant. The argument of Judge Miller in that case upon the subject, we are entirely unable to follow. It seems to be chiefly based on the ground that the main feature of the plan is a loan for the purpose of raising money for the Austrian Government, and that it therefore can not be a lottery. The chance feature of it is said to be a mere appendage and incident to the main purpose, by means of which the holder of the bond may receive a larger sum than the principal and interest which the bond itself provides for. He says that the holder of the bond runs no risk of loss, because he gets the principal and interest anyhow. This is a curious error.

The Austrian Government makes this plan of payment and redemption and prizes for the purpose of selling its so-called bond, and gets therefor as large a price as it can. That price necessarily includes a chance at the prizes. There is nothing whatever to show that all that the pur-

chaser pays for the bond is its nominal par value. On the contrary, the presumption necessarily is that he pays for the bond the principal and enough more to make it a reasonable price for the chance of receiving the large gifts or prizes. That part which he pays for the chance at the prizes he does run the risk of losing.

Then the learned judge goes on to argue that the buyer of a railway bond takes part in just such a scheme of chance, because the value of the railway bonds rises and falls with the market. It is hard to argue the difference between buying a railway bond and buying a share in a lottery or chance at prizes. Some things are too plain to admit of argument. The holder of the railway bond, however its value may vary with the fluctuations of the market, is entitled whenever that bond becomes due at a fixed time, to a fixed amount from the railroad company. The buyer of the Austrian State bond is entitled not only to a fixed amount, but also to a chance in an uncertain amount. The whole argument of the court of appeals seems to be that this scheme can not be called a lottery, because it is run by the Government with a view to floating its bonds and for the purpose of raising money to pay the Government expenses. None of these elements deprive it of its character as a scheme for the distribution of prizes by lot or chance, which makes it necessarily a lottery.

The California case, *Ex parte Shorbet* (70 Cal., 632), simply follows the New York case. It may be well to note that the New York statute denounced *illegal* lotteries, and that the Federal statute is wider in that respect than the New York statute; but we are constrained to admit

that the reasoning of the New York case, if it is held to be valid, would require a similar decision under the Federal statute. Our objection to the New York authority is that its reasoning is wholly fallacious.

Against these two authorities we set with confidence the short but convincing opinion of Judge Blodgett in the case of the *United States* vs. *Zeisler* (30 Fed. Rep., 499). The case of *Ballak* vs. *State of Maryland* (
), is another authority to sustain the view we take.

On all accounts we respectfully submit that the order of the court below should be affirmed.

WM. H. TAFT,
Solicitor-General.